Supreme Court, U.S.
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No.

In the Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, PETITIONER,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, RESPONDENT

BRIAN KAPSNER AND RYANN KAPSNER,
REAL PARTIES IN INTEREST.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Although Rule 34 of the Federal Rules of Civil Procedure does not require more, the Ninth Circuit concluded that a general objection to producing documents protected by the attorney-client privilege or work product doctrine is insufficient to preserve the privilege. Citing Rule 26(b)(5), the court concluded that the privilege is waived, notwithstanding the assertion of an objection in a Rule 34 response, if a privilege log identifying the documents withheld from production is not submitted within a "reasonable" time after Rule 34 responses are due. Retroactively applying this new "holistic reasonableness" analysis to the facts before it, the court concluded that BNSF had provided a privilege log too late and therefore declined to disturb the magistrate's ruling that BNSF had waived all of its privileges with respect to over 1,000 documents identified on that log.

Two questions are presented by the Ninth Circuit's decision:

1. Do the Federal Rules require a litigant to supply a privilege log in accordance with Rule 26(b)(5) when it responds to a Rule 34 request or is it sufficient to object to producing privileged materials in a Rule 34 response, subject to the later production of a log identifying the documents that are being withheld?

2. Can a court declare privileges waived simply because it concludes, in hindsight, that there was an unreasonable delay in providing a privilege log — without any finding of bad faith on the part of the responding party or prejudice to the opposing party?

PARTIES TO THE PROCEEDINGS

Petitioner is the BNSF Railway Company, formerly known as the Burlington Northern and Santa Fe Railway Company ("BNSF"), which is the defendant in the action out of which this proceeding arose. Because this is a mandamus proceeding, the respondent is the United States District Court for the District of Montana. Brian Kapsner and Ryann Kapsner are the plaintiffs in the action and the real parties in interest.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly held company. No other publicly held company owns 10 percent or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

BNSF respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying its petition for a writ of mandamus.

OPINIONS BELOW

The opinion of the court of appeals, as amended on the denial of rehearing (App., *infra*, 1a-11a), is reported at 408 F.3d 1142. The order entered by the district court (App., *infra*, 16a-17a) and the magistrate's opinion (App., *infra*, 12a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2005. Petitioner filed a timely petition for rehearing and rehearing en banc on April 14, 2005. The court of appeals denied BNSF's rehearing petition on May 19, 2005 and, at the same time, made a number of changes to its opinion. App., *infra*, 18a-20a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 34(b) of the Federal Rules of Civil Procedure provides in relevant part as follows:

> The party upon whom the request [to produce documents] is served shall serve a written response within 30 days after the service of the request. . . . The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

Rule 26(b)(5) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

STATEMENT

Until the sea change wrought by the Ninth Circuit decision in this case, it was customary for practitioners throughout the country to respond to requests for production just as BNSF did here: by serving a timely Rule 34 response objecting to the requests to the extent that they sought production of documents protected by attorney-client and work product privileges and then, at some later date, providing the opposing party with a privilege log specifically describing the documents being withheld on privilege grounds. Often, as in this case, the time-consuming task of creating a privilege log for documents that are *not* being produced is postponed until after the documents that *are* being produced have been provided to the opposing party.

This customary approach comports with the Federal Rules and is a practical way of ensuring that the often cumbersome process of producing a privilege log does not create a roadblock to discovery. Under this approach, Rule 34 responses are provided in a timely fashion. Responsive, non-privileged documents are delivered to the requesting party promptly, without waiting for the laborious compilation of a privilege log. And the right of the responding party to claim appropriate privileges is fully protected.

There is nothing in the Federal Rules that would alert practitioners that this customary and sensible procedure could result in a wholesale waiver of their client's privileges. As the Ninth Circuit acknowledged, Rule 34 requires objections to be made within 30 days of a request for production but does not explain how detailed objections must be; Rule 26(b)(5) requires a privilege log to be provided but does not say *when* it must be provided; and neither the Advisory Committee Notes to the Federal Rules nor judicial decisions provide clear guidance on these issues. Nevertheless, the court concluded that, when Rule 34 and Rule 26(b)(5) are read together, they create a regime under which the only way a party can be sure that it has preserved its privilege objections is to provide a privilege log at the same time that it serves its Rule 34 response.

The Ninth Circuit arrived at this result through a two-part rationale. First, it concluded that simply objecting to requests to the extent that they seek production of privileged documents — making what the court characterized as "boilerplate objections" — is not enough to meet the requirements of Rule 34. The court concluded that, under Rule 26(b)(5), all privilege objections must be supported by a description of the documents being withheld that is sufficient to allow the opposing party and the court to judge the validity of the privilege assertion. Second, the court concluded that a failure to serve the privilege log within a "reasonable" period of time constitutes a waiver of the privilege — without any need for a finding of bad faith, lack of cooperation in the discovery process, or prejudice to the opposing party. The court rejected the "per se" waiver rule the magistrate had employed, under which a failure to provide a privilege log along with a Rule 34 response would automatically be deemed a waiver of all privileges. The court substituted instead a "holistic reasonableness" rule under which a court would decide, on a case-by-case basis and with the benefit of hindsight, whether a delay in providing a privilege